State of Michigan
In The
Supreme Court

APPEAL FROM THE MICHIGAN COURT OF APPEALS

ESTATE OF DANIEL CAMERON, by
DIANE CAMERON and JAMES CAMERON,
Co-Guardians,

Plaintiffs-Appellants,

Supreme Court No. 127018

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

Court of Appeals No: 248315
Washtenaw County Circuit Court No: 02-549-NF

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTIONAL BASIS

Defendant-Appellee concurs with Plaintiffs-Appellants' statement of jurisdictional basis.[1]

[1]Although the pleadings indicate that the instant case was a probate court action, the Docket Sheet and the court records demonstrate that it was, in fact, a Washtenaw County Circuit Court case.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHERE AN UNPAID HEALTH CARE PROVIDER HAS NO LEGAL RIGHT TO RECOVER FROM THE INJURED PERSON, IS THE HEALTH CARE PROVIDER THE SOLE CLAIMANT FOR PURPOSES OF THE NO-FAULT ACT?

The lower courts did not address this issue.

Plaintiffs-Appellants contends the answer should be, "No".

Defendant-Appellee contends the answer should be, "Yes".

II.A. DOES THE 1993 AMENDMENT TO MCL 600.5851(1) LIMIT ITS APPLICATION TO CASES SUBJECT TO THE STATUTES OF LIMITATIONS CONTAINED IN THE RJA?

The trial court answered, "No".

The Court of Appeals answered, "Yes".

Plaintiffs-Appellants contends the answer should be, "No".

Defendant-Appellee contends the answer should be, "Yes".

II.B. IS THERE ANY LEGAL BASIS FOR REFUSING TO GIVE EFFECT TO THE 1993 AMENDMENT ACCORDING TO ITS TERMS?

The trial court did not address this issue.

The Court of Appeals implicitly answered, "No".

Plaintiffs-Appellants contends the answer should be, "Yes".

Defendant-Appellee contends the answer should be, "No".

III. DOES THE 1993 AMENDMENT TO MCL 600.5851(1) VIOLATE THE EQUAL PROTECTION GUARANTEES OF THE MICHIGAN AND UNITED STATES CONSTITUTIONS?

The lower courts did not address this issue.

Plaintiffs-Appellants contend the answer should be, "Yes".

Defendant-Appellee contends the answer should be, "No".

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COUNTER-STATEMENT OF FACTS

This is an action brought to recover benefits allegedly payable by AUTO CLUB INSURANCE ASSOCIATION (ACIA) pursuant to the Michigan No-Fault Act. Plaintiffs seek benefits for services rendered from August 1996 until some time in 1999. Suit was filed May 9, 2002. The trial court entered judgment in the amount of $182,500. The pertinent facts are undisputed.

DANIEL CAMERON was injured in an automobile accident which occurred in August 1996. (3b-4b, ¶¶5, 7). His parents, DIANE and JAMES CAMERON, claim attendant care benefits for the approximately three-year period from the time of the accident until DANIEL was first admitted into inpatient rehabilitation. (6b, 10b-11b, 12b, 14b, 18b, 21b, 22b)[2].

At no point did either MR. or MRS. CAMERON request payment for those services. (13b, 21b).

The Complaint in the instant case was filed May 9, 2002. (22a).

On March 11, 2003, Defendant filed a Motion for Summary Disposition (20a), arguing that Plaintiffs' claim was barred by the one-year-back provision of MCL 500.3145(1). Plaintiffs argued that §3145(1) was tolled by the minority tolling provision of MCL 600.5851(1). ACIA countered that §5851(1) does not apply to §3145(1).

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[2]The deposition transcripts of JAMES CAMERON and DIANE JOY CAMERON were attached below to Defendant's Motion for Summary Disposition as Appendix A and Appendix B, respectively.

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On April 8, 2003, the trial court entered an order denying summary disposition for ACIA, granting summary disposition in favor of Plaintiffs, and entering judgment in the amount of $182,500. (1a-2a).

ACIA appealed to the Michigan Court of Appeals. (19a). On July 13, 2004, that Court issued a published opinion (12a-17a) holding that the 1993 amended version of §5851(1) does not apply to first-party no-fault claims because they are not governed by an RJA statute of limitations. Cameron v ACIA, 263 Mich App 95, 103; 687 NW2d 354 (2004), lv gt'd, 472 Mich 899 (2005). Plaintiffs' motion for rehearing was denied in an order entered August 25, 2004. (18a).

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INTRODUCTION

With all of their talk of the potential harm to health care providers, the State of Michigan, and to the injured persons themselves, Plaintiffs and their Amicus Curiae have totally occluded what these types of cases are about. In order to provide some real life context to the legal discussion, ACIA will present a brief overview of the history of the "home attendant care"[3] cases.

The instant case is one of dozens pending in the Michigan courts in which family members seek recovery for services rendered years or even decades prior to filing suit. Some, like the instant case, go back only a few years. Others go back to the 1980's. Cooper v ACIA, Supreme Court No. 126755; Schmitz v Citizens Ins Co, Supreme Court No. 127034. Still others seek reimbursement going back to the 1970's. Bearden v DAIIE, Court of Appeals Nos. 255735, 258232. Multimillion dollar claims are not uncommon, with the "smaller" ones seeking hundreds of thousands of dollars.

In some of these cases, family members are claiming they have been underpaid. E.g., Bearden, supra; Cooper, supra. In others, like the instant case, no claim for attendant care benefits was ever made, but family members argue that they should

[3]Although the parents and family members sometimes also request "room and board" -- a claim now largely obviated by this Court's recent decision in Griffith v State Farm Mutual Automobile Ins Co, 472 Mich 521; 697 NW2d 895 (2005) (No. 122286) -- all of these cases seek reimbursement for home attendant care family members have provided.

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have been paid anyway. E.g., Schmitz, supra; Devillers v ACIA, Supreme Court No. 126899.

Although the Cameron decision may have some impact on health care providers who are dilatory in pursuing payment for their services (which hardly justifies shifting the consequences of such negligence to the motoring public), its impact will be felt almost exclusively by the fully competent adults who are seeking hundreds of thousands -- frequently millions -- of dollars in payments which they neglected to pursue for years or decades.

The one group which will **not** be affected whatsoever by Cameron are the young or mentally incompetent injured persons **who have already received the services** for which their family members belatedly seek monetary recovery. Any suggestion that this issue is about affording "protection" for those persons is a cynical attempt to exploit their disabilities in order to excuse the inaction of the only real parties in interest. The entire construct that claimants utilize to circumvent §3145(1) is premised on the fiction that the child incurs an expense because he owes his parents money, and that he therefore owns the claim. The identity of the "claimant" is the linchpin of these cases.

ACIA's discussion will underscore that fact by taking the unusual step of presenting its alternative ground for affirmance as its first issue. If ACIA prevails on that issue, the remaining issues presented by Plaintiffs -- including their constitutional challenge -- will be moot.

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I. WHERE AN UNPAID HEALTH CARE PROVIDER HAS NO LEGAL RIGHT TO RECOVER FROM THE INJURED PERSON, THE HEALTH CARE PROVIDER IS THE SOLE CLAIMANT FOR PURPOSES OF THE NO-FAULT ACT.

As an alternative ground for affirmance, this Court should hold that in circumstances such as obtain here, the sole claimants are the health care providers who are seeking to be paid.

Although this issue was not raised in the trial court, ACIA did allude to it in the Court of Appeals. (Defendant-Appellant's Reply Brief, p 1 n 1). In any event, this Court may address the issue in its discretion because it is a question of law and all of the facts necessary to its decision are in the record. E.g., Spruyette v Owens, 190 Mich App 127, 132, 475 NW2d 382 (1991); Michigan Millers Mutual Ins Co v Michigan Health Care Network, 174 Mich App 196, 198-99, 435 NW2d 423 (1988), lv den, 432 Mich 898 (1989). In these circumstances this Court should address this issue, because doing so is necessary to full enforcement of the legislative intent embodied in §3145(1) of the No-Fault Act.

There is yet another reason for this Court to address this issue. If the case can be resolved on nonconstitutional grounds, a court will not address constitutional issues. E.g., English v Blue Cross Blue Shield of Michigan, 263 Mich App 449, 455; 688 NW2d 523 (2004), lv den, 472 Mich 937 (2005). If this Court holds that in cases such as this the family member health care provider is the claimant, then Plaintiffs' constitutional challenge is moot because §5851(1) does not apply to them.

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Standard of Review

The application of a statute to undisputed facts is a question of law for this Court's de novo review. McAuley v General Motors, 457 Mich 513, 518, 578 NW2d 282 (1998).

Discussion

The Court of Appeals opinion in the instant case bars only benefits accrued[4] after April 1, 1994. However, a number of these attendant care cases date as far back as the 1970's. In such cases, the intent of the Legislature is thwarted by palpably erroneous Court of Appeals decisions which transfer the disability of the injured person to fully competent adult caregivers.

The provision of the No-Fault Act governing this issue reads as follows:

> "(1) An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, **the claimant** may not recover benefits

---

[4]The 1993 amendment does not apply to causes of action accruing prior to April 1, 1994. Although 1993 PA 78, §4, recites an effective date of October 1, 1993, the legislation did not garner the 2/3 majority necessary for immediate effect. Const 1963, art 4, §27. Accordingly, the amendment did not take effect until 90 days after the end of the legislative session.

PIP benefits accrue not when the bodily injury occurs, but when the allowable expense is incurred. MCL 500.3110(4).

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> for any portion of the loss incurred more than 1 year before the date on which the action was commenced."

MCL 500.3145(1) (emphasis added).

ACIA's contention is that the "claimants" in the instant case within the meaning of §3145(1) are Plaintiffs, not DANIEL. Plaintiffs are the persons purportedly entitled to payment for the services rendered. As such, they are in the same position as any other health care provider who has not been paid for services rendered.

Insofar as he has already received the services in question, DANIEL has no "identifiable and appreciable loss" if Plaintiffs are not paid. That point was recently made by the Court of Appeals in an unpublished opinion affirming the dismissal of a legal malpractice claim.

In Lomerson v Bujold, Court of Appeals No. 231505 (rel'd 6/25/02; unpublished) (25b-26b), the injured person received home attendant care services from his mother. He alleged that because of negligent advice that his mother received from the defendant attorney, she received inadequate payments from the insurer. The injured person sued the attorney. The trial court granted summary disposition in favor of the defendant.

The Court of Appeals affirmed, holding in pertinent part as follows:

> "However, for David to establish a legal malpractice claim he must prove that he was actually injured by defendant's alleged negligence. It is well established that a claim of malpractice requires a showing of actual injury caused by the malpractice. . . .

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> "Here, **David received attendant care services**, as provided by the no-fault act. David's mother, Mary, received payments for the attendant care services that she provided to David. Although Mary claims that she was under-compensated for her services as a result of defendant's allegedly negligent advice, **David has failed to establish that he sustained an actual injury as a result of defendant's allegedly negligent advice to his mother regarding the value of her attendant services. In other words, David has failed to demonstrate an identifiable and appreciable loss suffered as a result of defendant's alleged malpractice**."

(26b) (emphasis added).

Lomerson demonstrates that the only person with an identifiable and appreciable interest in being paid for the attendant care services is the person that rendered them. That being so, Plaintiffs are "the person[s] . . . entitled to the benefits" and "the proper person[s] to receive the benefits" within the meaning of the statute addressing payment of no-fault benefits:

> "**Personal protection insurance benefits are payable** to or **for the benefit of an injured person** or, in case of his death, to or for the benefit of his dependents. Payment by an insurer in good faith of personal protection insurance benefits, **to** or for the benefit of **a person who it believes is entitled to the benefits**, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is some doubt about **the proper person to receive the benefits** or the proper apportionment among the persons entitled thereto, the insurer, the claimant, or **any other interested person** may apply to the circuit court for an appropriate order."

MCL 500.3112 (emphasis added).

In express terms, §3112 contemplates in most cases **one** proper person to whom benefits should be paid. The injured person may be that person (as will be the case with work loss or,

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sometimes, replacement services), but may not necessarily be that person as to payment for medical expenses. Indeed, where services have been rendered, the proper payee is the health care provider, not the injured person. Thus, where, as here, the caregivers are the only persons with a financial interest in having the insurer pay for services, those persons are the "claimants" of the no-fault benefits. See Lakeland Neurocare Centers v State Farm, 250 Mich App 35; 645 NW2d 59, lv den, 467 Mich 909 (2002) (health care provider "claimant" within meaning of §3148[1] of No-Fault Act).

That conclusion is equally evident from the fact that DANIEL has not incurred any expenses because he is not legally obligated to pay his parents for their services.

In Manley v DAIIE, 127 Mich App 444; 339 NW2d 205 (1983), aff'd in part, rev'd in part, 425 Mich 140; 388 NW2d 216 (1986), the Court of Appeals expressly recognized that parents have an obligation to provide, inter alia, medical care:

> "Moreover, a parent's duty to support a minor child requires the parent to furnish all necessaries essential to the health and comfort of the child, including, for example, medical care."

127 Mich App at 453. That principle was cited with approval by this Court in its Manley opinion. 425 Mich at 153. See also MCL 722.3(1).

It necessarily follows that DANIEL was not obligated to pay his parents for their services. See, e.g., Yerkovich v AAA, 461 Mich 732, 740-41, 610 NW2d 542 (2000) (performance of pre-exist-

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ing duty cannot constitute contractual consideration); General Aviation, Inc v Capital Region Airport Authority, 224 Mich App 710, 714-15, 569 NW2d 883 (1997), lv den, 458 Mich 864, 582 NW2d 835 (1998) (same). In the absence of an obligation to pay, no expense is incurred. Proudfoot v State Farm Mutual Ins Co, 469 Mich 476, 484; 673 NW2d 739 (2003). That being so, DANIEL cannot be the "claimant" of the benefits here in question.

There are published Michigan appellate decisions to the contrary. The principal one is Geiger v DAIIE, 114 Mich App 283; 318 NW2d 833 (1982), lv den, 417 Mich 865 (1983). In that case, the plaintiff was injured in an automobile accident in May 1975. In March 1977, he became 18 years old. Eleven months later, his attorney gave the defendant its first notification of the accident.

The defendant denied the claim, invoking §3145(1). The defendant argued, inter alia, that the cause of action belonged to the mother, who had assumed the legal obligation to pay the expenses. A panel of the Court of Appeals disagreed, citing §3112:

> "This statute expressly confers a cause of action on the injured party to collect PIP benefits for expenses incurred as a result of his injury. We find no indication from the statute that the right to PIP benefits necessarily accrues to the person who is legally responsible for the expenses incurred as a result of the injury."

114 Mich App at 287.

Geiger was wrongly decided and should be overruled. Its holding is contrary to the controlling case law, and to the

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express language of the very statute it cited to justify ignoring that case law.

In Gumienny v Hess, 285 Mich 411; 280 NW 809 (1938), this Court held that where a minor is injured, his parents have a **separate and distinct cause of action** for expenses they incurred on the minor's behalf:

> "The general rule is well stated in 1 Freeman on Judgments (5th Ed.), §481 as follows:
>
> "'If an infant is wrongfully injured, **two distinct causes of action accrue, one in favor of the parents for** loss of services and **expenses incurred and another to the infant** for the other elements of damage from personal injuries including impaired earning capacity after reaching majority.'"

Id. at 414 (emphasis added).

That holding was followed in Walter v City of Flint, 40 Mich App 613; 199 NW2d 264 (1972), in which the Court of Appeals held that §5851(1) did not apply to a parent's cause of action for expenses incurred on behalf of the minor, because they were not persons "claiming under" the minor:

> "In Michigan, **an infant's cause of action** for damages **and the parents' cause of action to recover their expenses** and loss of services, though arising from the same set of circumstances, **are separate and independent causes of action**. *Gumienny v Hess*, 285 Mich 411 (1938); *Neilsen v Henry H Stephens, Inc*, 359 Mich 130 (1960); and *Morrison v Grass*, 314 Mich 87 (1946)."
>
> * * * *
>
> "In the instant case there was no disability existing for the parents at the time when their claim accrued. It is therefore, apparent that **the parents' separate and distinct claims do not fall within the protection of §5851(3)**. This is not inconsistent with

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> the language in subsection 1, which states that those claiming under the disabled person 'shall have one year after his disability is removed through death or otherwise'. **The phrase 'claiming under' in subsection 1 refers to a person who stands in place of the person who first sustained an injury, and who seeks to maintain the injured person's claim in his stead**. However, **one who maintains a separate but related cause of action is not 'claiming under' the original injured person**."

Id. at 615, 616 (emphasis added).

Geiger "distinguished" Walter and Gumienny as follows:

> "However, these cases involved common-law tort actions, not actions for PIP benefits under a contract of no-fault insurance. Plaintiff's right of recovery is clearly governed by the insurance policy and the no-fault act, not common-law tort principles."

114 Mich App at 287.

The Geiger opinion does not disclose what in the No-Fault Act compelled -- or even justified -- ignoring that case law. Instead, the opinion merely recites that the panel could find "no indication from [§3112] that the right to PIP benefits accrues to" anyone other than the injured person. Id. at 287.

Apparently, the panel did not look very hard at §3112, because its express language contemplates and addresses the possibility of a "person . . . entitled to the benefits" or a "proper person to receive the benefits" **other than the injured person**. Rather than abrogating the extant case law defining the proprietor of a cause of action, §3112 **ratified** it.

In short, Gumienny established that Plaintiffs' cause of action is separate and distinct from DANIEL's. Walter established that Plaintiffs are not persons "claiming under" DANIEL

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for purposes of §5851(1). Section 3112 expressly recognizes the possibility of an **entitlement** to benefits in someone **other than the injured person**. Thus, Geiger's holding that a first-party no-fault cause of action **always** belongs to the injured person is without any basis in the case law or the language of the statute. Where the only person entitled to the money is a health care provider, that person is the "claimant" for purposes of the No-Fault Act.

In sum, Geiger should be overruled because it failed to give effect to either the language of the statute or to the controlling Supreme Court authority. Geiger was cited uncritically in Commire v Automobile Club of Michigan Insurance Group, 183 Mich App 299, 302, 454 NW2d 248 (1990), and In re Hales Estate, 182 Mich App 55, 58, 451 NW2d 867 (1990). Those decisions should also be overruled to the extent that they follow Geiger on the issue under discussion.

In the instant case, Plaintiffs are the claimants. They were not minors at the time their cause of action accrued; therefore, §5851(1) does not apply to them. Without the benefit of §5851(1), Plaintiffs' claim for attendant care services is barred by §3145(1) of the No-Fault Act.

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II. THE COURT OF APPEALS DECISION GIVES EFFECT TO THE LANGUAGE OF THE STATUTE. (Plaintiffs' Issues I.-II.).

The Court of Appeals held that the insanity/minority tolling provision of MCL 600.5851(1), as amended in 1993, does not apply to MCL 500.3145(1), the limitations provision of the No-Fault Act. Plaintiffs challenge that decision, advancing a number of arguments which have no relation to the language of §5851(1).

In the following discussion, ACIA will first present an historical account of the language of §5851(1) and the case law applying it. That account will have the express terms of the statute as its focus. ACIA will then critique Plaintiffs' presentation in the context provided by that account. (Issue I.A.).

Thereafter, ACIA will address Plaintiffs' argument that this Court should ignore the effective date the Legislature gave to the 1993 amendment in the interest of "fairness". (Issue I.B.).

Standard of Review

This issue presents a question of statutory interpretation, which is a question of law for this Court's de novo review. DiPonio Construction Co v Rosati Masonry Co, 246 Mich App 43, 47, 631 NW2d 59, lv den, 465 Mich 896, 636 NW2d 141 (2001); Insurance Commissioner v Aageson Thibo Agency, 226 Mich App 336, 340-41, 573 NW2d 637 (1997), lv den, 459 Mich 867 (1998).

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A. THE 1993 AMENDMENT TO MCL 600.5851(1) LIMITS ITS APPLICATION TO CASES SUBJECT TO THE STATUTES OF LIMITATIONS CONTAINED IN THE RJA. (Plaintiffs' Issue I.).

The provision of the No-Fault Act governing this issue reads as follows:

> "(1) **An action for recovery of personal protection insurance benefits payable under this chapter** for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, **the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced**."

MCL 500.3145(1) (emphasis added).

In unambiguous terms, the statute mandates that a "claimant" may not recover expenses incurred more than one year prior to the date of suit. Therefore, Plaintiffs'[5] claim is barred absent some other controlling provision. The only such provision possibly applicable here reads in pertinent part as follows:

> "Except as otherwise provided in subsections (7) and (8), **if the person first entitled to** make an entry or **bring an action under this act is under 18 years of age or insane at the time the claim accrues**, the person or those claiming under the person shall have one year after the disability is removed through death or other-

[5]Unlike Issue I., supra, this discussion assumes that DANIEL is the "claimant".

wise to make the entry or bring the action although the period of limitations has run."

MCL 600.5851(1) (emphasis added). That provision is not applicable to claims brought under the No-Fault Act. Understanding why that is so requires an explanation of the history of RJA §5851(1).

Prior to 1963, the relevant tolling provision of the Judicature Act read as follows:

"If any person entitled to bring <u>any of the actions mentioned in this chapter</u>, at the time when the cause of action accrues, be within the age of 21 years, insane, or imprisoned in the state prison, such person may bring the action within the times in this chapter respectively limited, after the disability shall be removed."

1948 CL §609.15; 1929 CL §13978; 1915 CL §12325 (emphasis added).

In <u>Holland v Eaton</u>, 373 Mich 34; 127 NW2d 892 (1964), this Court addressed the applicability of this tolling provision to a suit filed under the Dram Shop Act. In 1958, the Legislature added a two-year statute of limitations to that act without any tolling provision. The plaintiffs filed suit more than two years after their auto accident. It was undisputed that if the tolling provisions of the Judicature Act applied, the dram shop suit was timely. <u>Id</u>., 38. This Court held that the tolling provisions did not apply, and that the suit was therefore time-barred.

Relying on its prior decisions, the <u>Holland</u> Court reiterated the "well settled rule . . . that the intent of the legislature in including a time limitation on bringing suit in a statute creating a right, is that the savings provisions of the general

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statute of limitations [i.e., the Judicature Act] are not applicable unless expressly included." Id., 39. Since the Dram Shop Act had no such provision, this Court concluded that the Legislature intended to exclude application of the tolling provisions to dram shop suits. Id., 40.

1961 PA 236 (which became effective January 1, 1963) repealed the 1915 Judicature Act and created the current RJA. Section 5851(1) of the 1961 act deleted the limitation to actions "mentioned in this chapter" and substituted the phrase "any action":

> "If the person first entitled to make an entry or bring any action is under 21 years of age, insane, or imprisoned at the time his claim accrues, he or those claiming under him shall have 1 year after his disability is removed through death or otherwise to make the entry or bring the action although the period of limitations has run. . . ."

1961 PA 236, §600.5851(1).[6]

In Lambert v Calhoun, 394 Mich 179; 229 NW2d 332 (1975), this Court addressed the importance of the change in the language effected by the 1961 amendment. In that case, the issue was whether the above-quoted savings provision applied to the three-year statute of limitations contained in the Motor Vehicle Accident Claims Act. 394 Mich at 182.

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[6]The "any action" language in §5851(1) was changed to "an action" in 1972 PA 87. (That act also substituted "18" for "21" years to reflect Michigan's new age of majority.) The change from "any" to "an" was not substantive because those are equivalent words. Empire Iron Mining Partnership v Orhanen, 455 Mich 410, 428, n 17; 565 NW2d 844 (1997).

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This Court held that the change in the language manifested the Legislature's intent that the savings provision applied to all actions, including those brought under statutes containing their own limitations periods:

> "There is no basis for indulging the assumption that the Legislature, aware of our former decisions, adopted the conditional right analysis. *Bigelow v Otis*, [267 Mich 409 (1934)], the first case to apply this analysis to savings provisions, was decided in 1916, after the enactment of the Judicature Act of 1915. **The language of the saving provision was, as previously indicated, changed in 1961 to cover 'any action' when the Revised Judicature Act was adopted.** *Holland*, although decided in 1964, arose under the 1915 Act. **This is the first consideration by this Court of this question in terms of the savings provisions of the Revised Judicature Act.**
>
> "We hold that the general saving provisions of the Revised Judicature Act apply to causes of action created by Michigan statutes."

394 Mich at 191-92 (emphasis added).

After Lambert, the Court of Appeals uniformly held that the "infancy/insanity" tolling provisions of RJA §5851 apply to the No-Fault Act's one-year limitation periods in §3145(1). Professional Rehabilitation Assocs v State Farm Mutual Automobile Ins Co, 228 Mich App 167, 175, 577 NW2d 909 (1998); Geiger v DAIIE, 114 Mich App 283, 288-289, 318 NW2d 833 (1982), lv den, 417 Mich 865 (1983); Hogan v Allstate Ins Co, 124 Mich App 465, 467, 335 NW2d 6 (1983); Hartman v Ins Co of N America, 106 Mich App 731, 743-744, 308 NW2d 625 (1981), lv den, 414 Mich 890 (1982); Rawlins v Aetna Casualty & Surety Co, 92 Mich App 268, 274-277,

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284 NW2d 782 (1979). However, all of those cases involved expenses incurred prior to April 1, 1994.

In 1993 PA 78, the Legislature reinserted the "under this act" language which appears in the current version of §5851(1) (quoted at the beginning of this discussion). That language unmistakably evinces the Legislature's intent to limit the savings provisions of the RJA to causes of action governed by the statutes of limitations set forth in the RJA.

A change in statutory language is presumed to reflect a change in meaning. E.g., Karpinski v St. John Hospital-Macomb Center Corp, 238 Mich App 539, 545, 606 NW2d 45 (1999); Smith v Hayes Albion, 214 Mich App 82, 89, 542 NW2d 298 (1995), lv den, 453 Mich 912 (1996). Thus, the Legislature is presumed to have changed the meaning of §5851(1) when it added the phrase "under this act".

Moreover, each word of a statute is presumed to be used for a purpose, and effect must be given to every clause as far as possible. Robinson v City of Detroit, 462 Mich 439, 459, 613 NW2d 307 (2000); People v Borchard-Ruhland, 460 Mich 278, 285, 597 NW2d 1 (1999). Courts must avoid any construction that renders any part of the statute surplusage or nugatory. Borchard-Ruhland, supra; Karpinski, supra, 543.

Plaintiffs argue that in Professional Rehabilitation Associates, supra, the Court of Appeals held that the 1993 version of §5851(1) applies to no-fault cases. (Plaintiffs' Brief, p 9-10). That contention is erroneous for two reasons.

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First, the panel in Professional Rehabilitation could not have ruled that the 1993 version of §5851(1) applied to no-fault claims because, by its terms, that version of the statute could not apply to the claim for benefits presented in Professional Rehabilitation.

> "(1) Sections 1483, 2912a, 5838a, **5851**, and 5856 of Act No. 236 of the Public Acts of 1961 as amended by this amendatory act, **do not apply to causes of action arising before October 1, 1993**."

1993 PA 78, §4(1) (emphasis added). (See footnote 4, supra at p 5).

The claim in Professional Rehabilitation was for services rendered in **1991**:

> "In a letter dated May 27, 1992, defendant denied payment for services plaintiff provided to Clifford on July 11, 1991, August 5, 1991, September 16, 1991, and December 31, 1991. On June 25, 1993, Cherrie Lay assigned Clifford's rights under the insurance policy to plaintiff. Plaintiff filed suit in the district court on May 12, 1994, seeking to recover the balance due on plaintiff's account for the four unpaid 1991 service dates."

228 Mich App at 168-69.

Second, Professional Rehabilitation did not address the issue raised in the instant case because it was not presented to the panel in Professional Rehabilitation. Defendant's argument in that case was that the appointment of a guardian negated the effect of §5851. 228 Mich App at 174-76. The Court of Appeals rejected that argument. Id.

However, the defendant in Professional Rehabilitation did not (and could not) argue that the language of the 1993 amendment

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removed no-fault claims from its ambit, because the amendment did not apply to the benefits involved in Professional Rehabilitation. The fact that the panel erroneously quoted the 1993 version of §5851(1) is of no moment, because the critical phrase, "under the act", was not relevant to the analysis. Therefore, it made no difference whether the opinion quoted the pre-amendment or post-amendment version of the statute.

A decision is not precedential on an issue not considered or decided. Sizemore v Smock, 430 Mich 283, 291 n 15, 422 NW2d 666 (1988); Moinet v Burnham, Stopel & Co, 143 Mich 489, 491, 106 NW 1126 (1906). Thus, Professional Rehabilitation is not on point.

In short, in the instant case the Court of Appeals correctly held that §5851(1) does not apply to post-April 1994 first-party no-fault cases. In the context provided by the foregoing analysis, ACIA will now critique the particular arguments advanced by Plaintiffs.

Plaintiffs' entire presentation is informed by their utter inability to give any meaning to the 1993 amendment other than the one posited by ACIA. That flaw in Plaintiffs' position is apparent in each point they make, which ACIA will now address.

Prior Court of Appeals Decisions. Plaintiffs commence their discussion by citing three Court of Appeals decisions which applied MCL 600.5851(1) to no-fault claims. (Plaintiffs' Brief, p 3-4). Every one of those cases was decided under the pre-1993

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version of the statute -- **which contained materially different language**.

The *Lambert* Case. Plaintiffs dispute ACIA's characterization of Lambert v Calhoun, supra, **arguing that the plain language of the statute** -- which applied the tolling provisions to "any action" -- **was irrelevant** to the Court's decision:

> "Ultimately, the court concluded that the general savings provisions of the RJA set forth in MCL 600.5851(1) apply to all causes of action, whether statutory or common law and regardless of whether a statute which creates the claim contains its own separate statute of limitations. In so ruling, the Supreme Court specifically rejected the notion that the Legislature intended to apply the RJA tolling provisions to some types of cases, but not to others. **This conclusion regarding the Legislature's intent is not affected by the phraseology in the first sentence of MCL 600.5851(1). Rather, the court was moved by public policy**."
>
> * * * *
>
> "**Policy and logic moved the *Lambert* court not semantics**."

(Plaintiffs' Brief, p 8-9) (emphasis added).

Controlling precedent from this Court makes clear that it is the language of the statute that governs, not the court's view of sound public policy:

> "**[W]e refuse to impose** upon the people of this state **our** individual **determinations of proper public policy**, relating to the availability of lawsuits arising from injuries on the public highways. **Rather, we seek to** faithfully construe and **apply** those stated public policy choices made by the Legislature when it drafted **the statutory language** of the highway exception."

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Nawrocki v Macomb County Road Commission, 463 Mich 143, 150-51; 615 NW2d 702 (2000) (emphasis added).

> "Reasonable minds can differ about whether it is sound public policy to so limit the duty imposed on authorities responsible for our roads and highways. **However, our function is not to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy. Our task is to discern the intent of the Legislature from the language of the statute it enacts.**"

Hanson v Board of County Road Commissioners of the County of Mescosta, 465 Mich 492, 504; 638 NW2d 396 (2002) (emphasis added).

ACIA cites Lambert as a case correctly applying the language of the statute before it:

> "**The language of the saving provision was**, as previously indicated, **changed** in 1961 to cover 'any action' **when the Revised Judicature Act was adopted**. *Holland,* although decided in 1964, arose under the 1915 Act. **This is the first consideration by this Court of this question in terms of the savings provisions of the Revised Judicature Act**.
>
> "We hold that the general savings provisions of the Revised Judicature Act apply to causes of action created by Michigan statutes."

394 Mich at 191-92 (emphasis added). Plaintiffs' focus on Lambert's now-discredited dicta should not obscure the import of the **change in language** that the case recognized and enforced.

Plaintiffs' insistence that Lambert must be viewed through the prism of judicially declared public policy -- rather than the language of the statute -- exposes their aversion to giving effect to legislative intent as written.

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"All lawsuits filed are brought 'under this act', i.e., the RJA". (Plaintiffs' Brief, p 6, 11). When Plaintiffs do attempt to confront the language of the 1993 amendment, the best that they can do is to render it nugatory.

The pre-1993 version of §5851(1) ("any action") rendered it applicable to "all lawsuits". Lambert, supra. Plaintiffs' interpretation of the 1993 version ("an action under this act") gives it precisely the same meaning despite the additional limiting phrase, "under this act".

Plaintiffs' interpretation is irreconcilable with two tenets of statutory interpretation: (1) A change in statutory language is presumed to reflect a change in meaning; and (2) Courts must avoid any construction that renders any part of the statute surplusage or nugatory. Robinson, supra; Karpinski, supra.

The flaw in Plaintiffs' reasoning is that they fail to appreciate the import of their own characterizations of the RJA. Plaintiffs expressly recognize that the RJA does not create causes of action, but only sets forth procedural rules (Plaintiffs' Brief, p 6), which include those defining the temporal limitations of actions. However, Plaintiffs fail to follow those premises to their logical conclusion: Within the context of §5851(1), an action "under this act" must denote an action governed by the periods of limitations set forth in the RJA. That is so because **it cannot mean anything else**.

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In a belated[7] effort to avoid that problem, Plaintiffs argue that the phrase "under this act" clarifies that §5851(1) does not apply to nonjudicial administrative proceedings. (Plaintiffs' Brief, p 12 n 1, p 13 & n 2). Like the other arguments advanced by Plaintiffs, that one falters on the plain language of the statute.

Throughout all of its permutations, §5851(1) always referred to an "action". The term "action" denotes a **judicial** proceeding, not an administrative one.[8] That proposition is readily demonstrated by reference to several dictionaries, which is a legitimate manner in which to ascertain its meaning. MCL 8.3a; Stanton v Battle Creek, 466 Mich 611, 617; 647 NW2d 508 (2002).

> "**action** . . . **3.** a civil or criminal **judicial** proceeding."

Black's Law Dictionary (7th ed 1999) (emphasis added).

> "**action** . . . **14.** *Law* A **judicial** proceeding whose purpose is to obtain relief at the hands of a **court**."

The American Heritage Dictionary of the English Language (4th ed 2000) (emphasis added).

> "**action 1a:** a **judicial** proceeding for the enforcement of a right, the redress or prevention of a wrong, or the punishment of a public offense -- compare *special proceeding* **b:** the right to bring or maintain such a **legal** or **judicial** proceeding."

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[7]In neither of the lower courts did Plaintiffs attempt to ascribe any meaning at all to the phrase "under this act".

[8]Plaintiffs themselves recognize that definitional limitation when they acknowledge that, "The words 'cause of action' means any judicial cause of action . . . ." (Plaintiffs' Brief, p 16) (emphasis added).

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Merriam-Webster's Dictionary of Law (1996) (emphasis added).

> "**action . . . 9.** a proceeding in a **court** of justice: *to bring action*"

The Random House Dictionary (1980) (emphasis added).

Thus, since its enactment in 1915, **in terms §5851(1) has never applied to administrative or nonjudicial proceedings**. Therefore, Plaintiffs' characterization of the 1993 amendatory language as "clarifying" that point gives absolutely no meaning to that language. Instead, it renders it absolutely superfluous.

Legislative History. (Plaintiffs' Brief, p 14-15). Stymied by the language of the statute, Plaintiffs argue that it should be ignored because there is no legislative history which supports giving it any meaning:

> "It is inconceivable that **absent significant legislative history** the legislature would by such an innocuous change in language bar a claim of an infant or incompetent person under the Michigan No-Fault Act."

(Plaintiffs' Brief, p 13) (emphasis added).

This Court has specifically rejected the precise analysis advanced by Plaintiffs:

> "The majority in *Dedes* interpreted the phrase 'the proximate cause' to mean 'a proximate cause'. It did this on the basis of an analysis that not to do so would produce a marked change in Michigan law, and that **the Legislature, in its 'legislative history,' gave no indication that it understood that it was making such a significant change**. This approach can best be described as a judicial theory of legislative befuddlement. **Stripped to its essence, it is an endeavor by the Court to use the statute's 'history' to contradict the statute's clear terms**. We believe the Court had no authority to do this."

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Robinson v City of Detroit, 462 Mich 439, 459-60; 613 NW2d 307 (2000) (emphasis added).[9]

Moreover, even assuming that legislative history were relevant to the analysis,[10] Michigan courts have recently and repeatedly dismissed the legislative analyses cited by Plaintiffs as a "feeble indicator of legislative intent and . . . therefore a generally unpersuasive tool of statutory construction." Frank W. Lynch & Co v Flex Technologies, Inc, 463 Mich 578, 587, 624 NW2d 180 (2001); Morales v Michigan Parole Board, 260 Mich App 29, 43, 676 NW2d 221 (2003), lv den, 470 Mich 885 (2004). This Court has articulated why that is so:

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[9]Justice Scalia has characterized arguments such as Plaintiffs' as a parody of legislative analysis:

> "Resort to legislative history has become so common that lawyerly wags have popularized a humorous quip inverting the oft-recited (and oft-ignored) rule as to when its use is appropriate: 'One should consult the text of the statute' the joke goes, 'only when the legislative history is ambiguous.' Alas, that is no longer funny. Reality has overtaken parody."

Scalia, A Matter of Interpretation (Princeton University Press, 1997), p 31.

[10]Legislative history of any form is proper only where a genuine ambiguity exists in the statute. Legislative history cannot be used to create an ambiguity where one does not otherwise exist. In re Certified Question, 468 Mich 109, 115 n 5 (2003). As demonstrated above, Plaintiffs advance no tenable alternative meaning which gives effect to the amendatory language. Essentially, Plaintiffs argue that the legislative history demonstrates that the statutory language in question has no meaning. That is **not** an ambiguity argument, it is a nullification argument.

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> "These staff analyses are entitled to little judicial consideration in resolving ambiguous statutory provisions because: (1) **such analyses are not an official form of legislative record** in Michigan, (2) **such analyses do not purport to represent the views of legislators**, individually or collectively, but merely to set forth the views of professional staff offices situated within the legislative branch, and (3) **such analyses are produced outside the boundaries of the legislative process** as defined in the Michigan Constitution, and which is a prerequisite for the enactment of a law. Const 1963, art 4, §§26 & 33. **In no way can a 'legislative analysis' be said to officially summarize the intentions of** those who have been designated by the Constitution to be **participants in this legislative process**, the members of the House and the Senate and the Governor. For that reason, legislative analyses should be accorded very little significance by courts when construing a statute."

In re Certified Question, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003) (emphasis added). Accord Morales, supra.

Subsections 5851(9)-(10). (Plaintiffs' Brief, p 16-17). Plaintiffs also argue that prisoners would not have the benefit of the grace period bestowed by §§5851(9)-(10) unless the limitations period governing their actions is contained in the RJA. In this, Plaintiffs are correct.

Plaintiffs then argue that that result is inconsistent with the reference in those provisions to the prisoner having "a cause of action", because it renders that language nugatory. That argument is a nonsequitur which ignores both the language and the evident purpose of the relevant provisions.

Subsections (9) and (10) mirror the one-year period set forth in subsection (1) within which an erstwhile minor or incompetent may bring suit after his disability is removed. All

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three subsections are, by hypothesis, limited to causes of action governed by an RJA period of limitations. There is nothing in that statutory arrangement which is inconsistent with the existence of a cause of action.

Plaintiffs' argument that the plain meaning of the phrase "under this act" renders nugatory the "cause of action" reference in §§(9) and (10) confuses the existence of a cause of action with the time within which it must be brought. A prisoner's cause of action is "negated" only if he fails to bring it within the prescribed time. There is therefore nothing inconsistent in applying the "under this act" language to all three subsections.

Infants Hiring Lawyers. (Plaintiffs' Brief, p 17). In a final attempt to circumvent the statutory language, Plaintiffs ask this Court to ignore it because enforcing it would be "a travesty".

> "For the Courts to tell an infant or incompetent person they have to hire a lawyer and bring a lawsuit within one year of those expenses, or be forever barred from life time benefits or benefits older than one year, would be a travesty of justice and common sense."

(Plaintiffs' Brief, p 17).

In addition to being irrelevant[11], that argument has no basis in reality in the context of a first-party no-fault case.

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[11]This Court has held that the text of a statute may not be ignored on the ground that a court deems its result absurd. People v MacIntire, 461 Mich 147, 155 n 2, 599 NW2d 102 (1999). See also, Maier v General Telephone Co, 466 Mich 879, 645 NW2d 654 (2002) (Corrigan, CJ, concurring).

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When a minor or incompetent is injured in an automobile accident and requires treatment, he does not contract for it himself. Arrangements are made by his parents or guardian, who become responsible for payment. Any dispute with a no-fault insurer over payment for those services will be immediately litigated because it is in the interest of both the health care provider and the parents/guardians to do so. No one will consult with the minor or ask him to hire an attorney. Those with an interest will do so.[12]

Section 3145(1) of the No-Fault Act requires that suit be filed within one year of the date that the disputed expense was incurred. In the context of services provided by hospitals, physicians, or other health care professionals, that requirement is hardly onerous, especially given their interest in recovering their money as soon as possible.

In the instant case, Plaintiffs, MR. and MRS. CAMERON, complain that treating them the same as other health care providers is preposterous and defies common sense. Actually, it is Plaintiffs who are maintaining a logically questionable position.

If Plaintiffs had provided home care for a mentally competent adult, they would unquestionably be bound by §3145(1). Nevertheless, they contend that the fortuity that their "patient" is a minor relieves them of the obligation to make a timely claim

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[12]Health care providers have standing to sue a no-fault insurer. Lakeland Neurocare Centers v State Farm, 250 Mich App 35, 645 NW2d 59 (2002).

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or to timely file suit. Whatever else may be said, there is hardly anything intuitively rational about that position.

In short, there is nothing absurd about enforcing §3145(1) of the No-Fault Act as written, unmodified by §5851(1) of the RJA. Plaintiffs' entire argument is an object lesson in the avoidance of giving effect to statutory language. As such, it should be rejected by this Court.

B. THERE IS NO LEGAL BASIS FOR REFUSING TO GIVE EFFECT TO THE 1993 AMENDMENT ACCORDING TO ITS TERMS. (Plaintiffs' Issue II.).

Plaintiffs argue that this Court should limit the Court of Appeals decision to prospective application only. ACIA's response is threefold.

First, nothing in the Court of Appeals opinion even raises a legitimate issue of retroactivity. That opinion merely enforces the plain language of the statute. The **Legislature** has already defined the reach of the 1993 amendment:

> "(1) Sections 1483, 2912a, 5838a, 5851, and 5856 of Act No. 236 of the Public Acts of 1961 as amended by this amendatory act, do not apply to causes of action arising before October 1, 1993."

1993 PA 78, §4(1).[13] It is patent that the Legislature intended the amendment to apply to causes of action arising after the effective date of the statute. It would be inappropriate for this Court to repeal that legislative mandate.

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[13]See footnote 4, supra at 6.

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Second, retroactivity analysis is inapposite here because the Court of Appeals opinion did not announce a new rule of law or overrule any prior cases.[14] Rather, it simply applied the 1993 amendment for the first time. In a decision involving another portion of that same Public Act, the Court of Appeals held that full retroactivity (the normal rule) applies in such circumstances:

> "**That a decision may involve an issue of first impression does not** in and of itself **justify giving it only prospective application where the decision** does not announce a new rule of law or change existing law, but **merely provides an interpretation that has not previously been the subject of an appellate court decision**. *Jahner v Dep't of Corrections*, 197 Mich App 111, 114, 495 NW2d 168 (1992)."
>
> * * * *
>
> "This Court's *Scarsella* decision, although arguably a case of first impression, neither overruled existing precedent nor announced a new rule of law. Plaintiff correctly observes that *Buscaino v Rhodes*, 385 Mich 474, 189 NW2d 202 (1971) . . . stated that a civil action is commenced by filing a complaint and that commencing an action within the statutory period tolls the limitation. [Citation omitted]. While it may appear that *Scarsella* overruled this precedent, **it was not the 1998 *Scarsella* decision that altered precedent, but the prior enactment of 1993 PA 78, the tort reform legislation that added the affidavit of merit requirement. *Scarsella* merely interpreted the clear and unambiguous statutory language that established new, stricter standards for initiating medical malpractice actions**. [Citation omitted]. **Because *Scarsella*** did not overrule a precedent or establish new law, but **merely provided a statutory interpretation not previously the subject of an appellate**

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[14]This fact decisively distinguishes the instant case from Pohutski v City of Allen Park, 465 Mich 675; 641 NW2d 219 (2002), which Plaintiffs quote at page 19 of their brief.

> **court decision, we conclude that the trial court erred in refusing to retroactively apply *Scarsella*."**

Holmes v Michigan Capital Medical Center, 242 Mich App 703, 713, 713-14; 620 NW2d 319 (2000), lv den, 465 Mich 899 (2001) (emphasis added).

In a case involving another statute, the Court of Appeals reached the same result:

> "However, the addressing the matter of first impression does not in and of itself justify only prospective application of the decision where the case does not announce a new rule of law but merely provides an interpretation that has not previously been the subject of an appellate court decision. We think it appropriate to apply *Field Enterprises* retroactively **because it simply interpreted the SBTA**."

Columbia Associates, LP v Department of Treasury, 250 Mich App 656, 688-89, 649 NW2d 760, lv den, 467 Mich 925 (2002).

Finally, Plaintiffs' apocalyptic perorations merit a response.

As demonstrated above, this case and the others like it have never been about making care available to infants or brain-injured persons. Inherent in the scenario giving rise to these claims is that **the injured persons have already received the care**. These cases are about **fully competent adults** seeking large sums of money on the basis of claims they should have asserted years or decades ago.

To press such claims is understandable. But to cloak them in the mantle of making care **available** to severely injured persons is unspeakably cynical. Do Plaintiffs seriously maintain

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that family members will not render home attendant care unless they are assured that they can wait forever to claim compensation from the insurer, seeking to reap a 12% return (no-fault interest) as a reward for their delay?

Nor need this Court worry about massive numbers of doctors and institutional health care providers not being paid. As ACIA explained above, both health care providers and the persons legally responsible for the bills have a palpable and immediate interest in seeing them paid. Given that health care providers have standing to pursue those claims directly against an insurer, e.g., Professional Rehabilitation Associates v State Farm Mutual Automobile Ins Co, 228 Mich App 167; 577 NW2d 909 (1998), there is no reason to think that they will habitually sleep on their rights. And if they do, there is no apparent justification for foisting the cost of their institutional negligence on the motoring public whose premiums fund the no-fault system.

In sum, there is no legally cognizable basis for limiting the scope of the amendment of §5851(1) to less than the Legislature prescribed. This Court should reject the invitation to judicially abrogate plain legislative intent.

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III. THE 1993 AMENDMENT TO MCL 600.5851(1) DOES NOT VIOLATE THE EQUAL PROTECTION GUARANTIES OF THE MICHIGAN AND UNITED STATES CONSTITUTIONS. (Plaintiffs' Issue III.).

It is worth noting at the outset that this issue is moot if this Court holds that MR. and MRS. CAMERON are the "claimants". (See Issue I., supra). This Court should also note that even if DANIEL were to be deemed the "claimant", he has sustained no injury because he has already received the services and has no substantial interest in whether his parents are paid. That being so, his estate has no viable constitutional challenge. See, e.g., Barrows v Jackson, 346 US 249, 255, 73 S Ct 1031, 1034, 97 L Ed 1586 (1953); Palmer v Thompson, 391 F2d 324, 327 (5th Cir 1967), aff'd, 403 US 217, 91 S Ct 1940, 29 L Ed 2d 438 (1971).

That said, ACIA will nevertheless demonstrate that the substance of Plaintiffs' argument is without legal merit.

Standard of Review

The constitutionality of a statute is an issue which is reviewed de novo. Wayne County v Hathcock, 471 Mich 445, 455, 684 NW2d 765 (2004); People v Hickman, 470 Mich 602, 605, 684 NW2d 267 (2004).

Discussion

The first step in the analysis is to isolate the classification created by the 1993 amendment to §5851(1). Contrary to Plaintiffs' representations, that amendment does not draw distinctions based upon minority or insanity. Instead, that amendment creates the following two categories of persons:

(1) Minors and insane persons with causes of actions governed by statutes of limitations contained in the RJA; and

(2) Minors and insane persons with causes of actions governed by statutes of limitations **not** contained in the RJA.

The latter category may not take advantage of the tolling provision of §5851(1).

Thus, the distinction is not based upon minority or insanity, but rather upon the statute of limitations governing the cause of action asserted. The question is whether that classification is a valid exercise of legislative judgment.

The second step in the analysis is to determine the appropriate level of review. "Strict scrutiny" is not appropriate because the classification is not based upon "suspect" factors such as race, national origin, or ethnicity. Crego v Coleman, 463 Mich 248, 259; 615 NW2d 218 (2000). Nor is "heightened scrutiny" appropriate, because the distinction is not based on gender or illegitimacy. Clark v Jeter, 486 US 456, 108 S Ct 1910, 100 L Ed 2d 465 (1988); Crego, supra at 260-61. Therefore, the appropriate level of review is "rational basis".

> "**Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose**. *Dandridge v Williams*, 397 US 471, 485; 90 S Ct 1153; 25 L Ed 2d 491 (1970). To prevail under this highly deferential standard of review, a challenger must show that the legislation is 'arbitrary and wholly unrelated in a rational way to the objective of the statute.' *Smith v Employment Security Comm*, 410 Mich 231, 271; 301 NW2d 285 (1981). **A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts**, either known or

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> **which could reasonably be assumed, even if** such facts may be **debatable**. *Shavers v Attorney General*, 402 Mich 554, 613-614; 267 NW2d 72 (1978). **Rational-basis review does not test the wisdom**, need, or appropriateness **of the legislation**, or whether the classification is made with 'mathematical nicety,' **or** even **whether it results in some inequity when put into practice**. *O'Donnell v State Farm Mut Automobile Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979). Rather, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption. *Shavers, supra*."

Crego, supra at 259-60 (emphasis added).

This Court recently expressed the great reluctance that courts should have in striking a statute:

> "Statutes are presumed constitutional. We exercise the power to declare a law unconstitutional with **extreme caution** and we **never exercise it where serious doubt exists** with regard to the conflict."

Phillips v Mirack, Inc, 470 Mich 415, 422; 685 NW2d 174 (2004) (emphasis added).

The governmental purpose behind statutes of limitation is, inter alia, to prevent stale claims by requiring litigants to pursue their claims in timely fashion. Pendergast v American Fidelity Fire Ins Co, 118 Mich App 838, 841-42, 325 NW2d 602 (1982); Allen v Farm Bureau Ins Co, 210 Mich App 591, 599, 534 NW2d 177 (1995). Section 5851(1) creates an exception to statutes of limitations for minors and mental incompetents in order to protect their interests. The purposes of both types of statutes are legitimate governmental objectives. The precise question is whether the Legislature's decision to limit the

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exception to causes of action governed by RJA statutes of limitations was rational.

That decision is amply justified by distinctions between causes of action governed by the RJA statutes of limitations and special statutory schemes governed by their own statutes of limitations rather than by the general catchall period set forth in MCL 600.5813. The same special considerations which moved the Legislature to enact separate statutes of limitations for the special statutory schemes would justify finding tolling inappropriate.

In particular, the no-fault injury reparations scheme involves the processing of tens of thousands of claims per year for different products, services, and accommodations. Given that volume and the importance of the insurers having a reasonable opportunity to investigate claims while they are fresh, the Legislature was fully warranted in exempting first-party no-fault claims from the ambit of the tolling provision of §5851(1).

That is particularly so given the undeniable importance of maintaining a fiscally viable no-fault injury reparations scheme, while keeping premiums at affordable levels. Shavers v Attorney General, 402 Mich 554, 596, 600; 267 NW2d 72 (1978). Limiting the exposure of the first-party no-fault system in all cases to claims incurred within one year prior to suit constitutes a legislative judgment balancing the interests of minors and insane persons against the interests of the entire motoring public in a viable and affordable no-fault system.

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One may quibble with the wisdom of that legislative choice, but it cannot be characterized as irrational. That being so, the amendment passes constitutional muster.

Plaintiffs also argue that there is no rational basis for distinguishing first-party no-fault claims (as to which the statute is not tolled) from third-party auto negligence claims (as to which the three-year RJA statute is tolled). (Plaintiffs' Brief, p 20-21). However, there are at least three material aspects of first-party and third-party claims which justify differential treatment of their respective statutes of limitations.

First, there is a distinction as to the volume and targets of the claims. Each year, tens of thousands of first-party claims are made on a limited number of no-fault insurers. The task of having to reconstruct hundreds of claims going back 20 years is an extremely substantial burden on no-fault insurers.

In contrast, the defendant in a third-party auto claim is not going to be sued hundreds of times. The burden of the driver's having to recall the circumstances of the accident in question is hardly as daunting a task as adjusting hundreds of 20-year-old PIP claims. Moreover, the passage of time actually enhances the ability to determine whether an injury affects a claimant's general ability to lead a normal life. See Kreiner v Fischer, 471 Mich 109, 129-34; 683 NW2d 611 (2004).

Second, there is a distinction as to the fiscal ramifications of allowing late claims to be litigated. The "home atten-

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dant care" cases involve tens of millions of dollars per year in stale claims. The impact on the rates paid by the motoring public is virtually self-evident. Premiums (including the MCCA assessment), which are intended to pay for current and future claims, would have to increase in order to pay for losses incurred years and decades in the past.

In contrast, the occasional third-party auto negligence case which gets litigated years after the fact has a negligible effect (if any) on liability insurance rates, and no effect on rates for first-party coverage. The loss in third-party cases is covered by one liability policy, with fixed limits, for which the premium has already been paid. The net impact of such cases on the no-fault system is close to zero.

Third, the difference in the statutes of limitations governing first-party and third-party claims reflects a rational legislative trade-off. The tort action is a one-time right to sue for the minor's actual loss, which action can be lost after the tolling period expires. However, the right to no-fault benefits extends over the lifetime of the injured person, but is limited to benefits incurred within one year of suit. Expanding the right to PIP payment forward over a lifetime in exchange for cutting off past benefits is a logical trade-off for a longer right to sue for a one-shot right to be compensated for all past and future noneconomic damages.

Plaintiffs supplement their argument with a discussion of a potpourri of cases from jurisdictions whose courts of last resort

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-- unlike Michigan's -- gave effect to their disagreement with legislative policy choices by nullifying them under the guise of constitutional analysis. (Plaintiffs' Brief, p 29-34). ACIA will discuss those cases in the order and format in which Plaintiffs presented them.

1. Whitlow v Board of Education of Kanawha County, 199 W Va 223; 438 SE2d 15 (1993).

In Whitlow, the West Virginia Supreme Court held that the statute in question violated the equal protection clause of the **West Virginia** constitution. The West Virginia Supreme Court's view of the scope of its power under the West Virginia constitution is not even relevant, much less persuasive, to analysis under the Michigan and U.S. Constitutions.

Furthermore, the Whitlow court employed a tactic repeated in the other cases cited by Plaintiffs. Specifically, rather than analyzing the issue in the context of the purposes served by a statute of limitations (avoidance of stale claims), the court based its decision on the fact that curtailing minority tolling would not reduce the number of suits:

> "Carving suits by infants against political subdivisions out of the general statutory tolling provisions can hardly be thought to substantially diminish the number of suits filed."

438 SE2d at 23. The court then justified its action by articulating its view of the proper public policy priorities. 438 NE2d at 23.

A more coherent and balanced analysis of the purpose of curtailing the scope of minority tolling provisions was articu-

lated by the Court of Appeals of Indiana in the course of rejecting a constitutional challenge:

> "The general purpose of a statute of limitation is to encourage prompt presentation of claims. When any alleged tortfeasor is required to defend a claim long after the alleged wrong has occurred, the ability to successfully do so is diminished by reason of dimmed memories, the death of witnesses, and lost documents. As the years between injury and suit increase, so does the probability that the search for truth at trial will be impeded and contorted to the benefit of the plaintiff."

Ledbetter v Hunter, 652 NE2d 543, 547 (Ind App 1995).

The issue in Ledbetter, as in the instant case, was whether curtailing the scope of minority tolling provisions is warranted by the importance of those problems in the context of the specific statutory scheme in question. That analysis echoes ACIA's discussion of the rationale of amending §5851(1) as it applies to the No-Fault Act.

2. Schwan v Riverside Methodist Hospital, 6 Ohio St 3d 300; 452 NE2d 1337 (1983).

In Schwan, the Ohio Supreme Court held that the statute in question violated the Ohio Constitution.[15] Thus, it is no more relevant here than Whitlow.

Moreover, the statute in question was held constitutionally infirm because it distinguished between minors less than 10 years old and minors aged 10 years or over. 452 NE2d at 1339. That distinction is not made in §5851(1) as amended.

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[15]There is no indication in the opinion that the court was applying federal constitutional law.

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Finally, like the Whitlow court, the Schwan court imposed its own view of correct public policy by ignoring the obvious basis for the distinction drawn. The Ledbetter court articulated that basis as follows:

> "In balancing the interests involved here, the Legislature may well have given consideration to the fact that most children by the time they reach the age of six years are in a position to verbally communicate their physical complaints to parents or other adults having a natural sympathy with them. Such communications and the persons whom they reach may to some appreciable degree stand surrogate for the lack of maturity and judgment of infants in this matter."

Ledbetter, supra at 547-58.[16]

3. Lyons v Lederle Laboratories, 440 NW2d 769 (SD 1989).

In Lyons, after letting slip its doubt as to the legitimacy of the Legislature's view of the necessity of the statute ("the legislation was enacted in response to some **perceived** malpractice crisis", 440 NW2d at 771 [emphasis added]), the South Dakota Supreme Court perpetrated the same faulty analysis as the Whitlow court:

> "We fail to perceive any rational basis for assuming that medical malpractice claims will diminish simply by requiring the suits to be instituted at an earlier date."

Id. at 771.

The fallaciousness of that approach has already been discussed.

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[16]Ledbetter involved a statute which drew the line at six years rather than 10 years of age. However, its reasoning applies equally to the statute involved in Schwan.

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4. Carson v Maurer, 120 NH 925; 424 A2d 825 (1980).

Carson may be the least applicable of the cases cited by Plaintiffs.

First, like Whitlow and Schwan, it constitutes the view of another state's court of last resort as to its power under that state's constitution.

Second, Carson did not utilize the "rational relationship" test, but rather a "more rigorous judicial scrutiny than allowed under the rational basis test". 424 A2d at 830. The Michigan Court of Appeals noted that distinction in finding Carson inapplicable to Michigan constitutional jurisprudence. Wysocki v Felt, 248 Mich App 346, 358; 639 NW2d 572 (2001).

Third, as in the other cases cited by Plaintiffs, the court declined to analyze the statute in the context of its most obvious purpose -- to eliminate stale claims in a particular category of cases. Instead, like Whitlow and Lyons, the court simply noted that the statute would not reduce the number of suits. 424 A2d at 834.

5. Admasky v Buckeye Local School District, 73 Ohio St 3d 360; 653 NE2d 212 (1995).

Admasky is yet another case decided under another state's constitutional jurisprudence, which apparently does not require serious consideration of anything other than the court's view of sound public policy.

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In the excerpt quoted by Plaintiffs, the court alludes to "unfair [in the court's view] results", cites to a court rule that it promulgated, and solemnly intones:

> ". . . **we** can discern no rational reason to deny due process or the right to redress to those few children who, for whatever reason, did not have an action brought on their behalf within the two-year limitations period."

653 NE2d at 214-15 (emphasis added).

Of course, the proper analysis is whether the **Legislature** could discern a basis for the distinction drawn. The dissent in Admasky had no trouble doing so:

> "There are at least two viable basis on which the legislature could have concluded that the lack of a tolling provision . . . furthers the legitimate goal of preserving the financial resources of political subdivisions. First, the legislature could have been concerned that **there may be more claims against political subdivisions than private entities**, given the size of political subdivisions and their often times far-flung operations. Thus, with respect to political subdivisions, **there would be both an increase in the burden of investigating potential claims and the danger of stale claims**. Second, **the lack of a tolling provision advances the interest of preserving the financial resources of political subdivisions by allowing them to predict and to control their potential liabilities from year to year**. Both of these are legitimate, rational reasons that are directly related to the absence of a tolling provision."

653 NE2d at 216 (emphasis added).

With no substantial changes, that passage would apply with equal force to preserving the fiscal integrity of the No-Fault Act against precisely the types of claims as the one brought here.

In sum, exempting first-party no-fault claims from insanity/minority tolling is rationally warranted by concern for the effect on the no-fault system of investigating, litigating, and paying tens of millions of dollars of stale claims. There is no basis for judicial nullification of that legislative policy choice.

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RELIEF

Defendant-Appellee, AUTO CLUB INSURANCE ASSOCIATION, prays this Honorable Court to issue an opinion holding that:

(1) Where the injured person has no financial interest in the payment of medical expenses, the health care provider is the only "claimant" for purposes of §3145(1) of the No-Fault Act; and/or

(2) The 1993 amendment to MCL 600.5851(1) limited its applicability to causes of action governed by statutes of limitations contained in the Revised Judicature Act; and

(3) That amendment does not violate the Equal Protection Clauses of the Michigan or United States Constitutions.

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